FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 2

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

ARKANSAS COMMERCE COMMISSION AND ARKANSAS ASSESSMENT COORDINATION DEPARTMENT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Kansas City Southern Railway Company, petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arkansas entered in the above entitled cause on April 13, 1959, Motion for Rehearing in said cause denied May 11, 1959.

I. Citation of Opinion Below

The opinion of the Supreme Court of the State of Arkansas, printed in Appendix A hereto, at Page 25 reported in 323 SW 2d 193. The order of said Court denying Motion for Rehearing, printed in Appendix B hereto, at Page 33.

II. Grounds on Which Jurisdiction Invoked

1. Opinion of the Arkansas Supreme Court entered April 13, 1959, and order denying Motion for Rehearing rendered May 11, 1959, exhausted Petitioner's state remedies.

2. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3), since a right and privilege was specifically claimed under the Constitution and Statutes of the United States, and denied.

III. Questions Presented

1. Whether refusal to allow credit for depreciation accrued in 1956 at the established rate of 3.2% against Interstate Commerce Commission's Reproduction Cost New less Depreciation as of December 31, 1955, constituted taking Petitioner's property without due process and a denial of equal protection of law under the Constitution of the United States, Fourteenth Amendment.

2. Whether refusal to allow the deduction of economic and functional obsolescence from the Interstate Commerce Commission's report of reproduction cost new less depreciation in valuing Petitioner's property, constituted the taking of said property without due process of law and a denial of equal protection under the Constitution of the United States, Fourteenth Amendment.

3. Whether refusal to permit deduction of full repro-

duction cost new less depreciation of non-operating or separately taxed properties included in the Interstate Commerce Commission's determination of reproduction cost new less depreciation in valuing Petitioner's property, in direct violation of the Arkansas Statutory Mandate,[1] constituted the taking of property without due process of law and a denial of equal protection under the Constitution of the United States, Fourteenth Amendment.

4. Whether the Court erred in refusing to direct the use of Working Capital, including Material and Supplies calculated by Interstate Commmerce Commission as an additive to the determination of reproduction cost new less depreciation, as an element of property value, rather than authorizing the use of an arbitrary and excessive amount of Working Capital based on 45 days expenses of the previous year plus undepreciated balance sheet values of Material and Supplies, thereby taking Petitioner's property without due process of law and denying it equal protection,[2] under the Constitution of the United States, Fourteenth Amendment.

5. Whether the arbitrary use of a composite capitalization rate of 5.75% applied to Petitioner's n railway operating income as an element to develop taxable valuation, constitutes the taking of property without due process of law and a denial of equal protection of the law, under the United States, Fourteenth Amendment, instead of use of a rate of 6.22% developed by Petitioner's individual characteristics and utilized in computing the composite rate.

5-a. Whether the use of current liabilities on a yield basis of 2.00% as an element in determining the composite capitalization rate of 5.75% constitutes the taking of petitioner's property without due process of law and a

[1] Ark. Stat. Ann. Sec. 84-606 (1947) (See Appendix C).

denial of equal protection of the law under Constitution of the United States, Fourteenth Amendment, when said capitalization rate produces a valuation element in excess of reproduction cost new less depreciation and less economic and functional obsolescence.

5-b. Whether the use of a composite capitalization rate of 5.75% when applied to Petitioner's net railway operating income as an element in developing taxable valuation, constitutes the taking of property without due process of law and a denial of equal protection of the law under the Constitution of the United States, Fourteenth Amendment, when the official Arkansas Assessors' Manual directs State County Assessors to use a capitalization rate of 7.00% in determining taxable values of industrial and commercial properties.

6. Whether the refusal to deduct the market value of Petitioner's nonoperating property from market value of the stock and funded debt element of taxable value, constitutes the taking of property without due process of law and a denial of equal protection of the law under the Constitution of the United States, Fourteenth Amendment.

7. Whether the refusal to use proper allocating factors to determine Arkansas' portion of Petitioner's unit value, results in taxing in Arkansas of property taxable in other jurisdictions, and constitutes the taking of property without due process of law and a denial of equal protection of the law, under the Constitution of the United States, Fourteenth Amendment.

7-a. Whether refusal to give credit for value destroyed by extraordinary expenses peculiar to the State of Arkansas in operating over mountainous terrain, and cost of extra brakeman required by the Arkansas "Full Crew" law, constitutes the taking of property without due process of law and a denial of equal protection of

the law under the Constitution of the United States, Fourteenth Amendment.

8. Whether the refusal to equalize Petitioner's taxable value at the average state assessing ratio as determined by independent ratio studies and the State scientific appraisal—assessment ratio study, constitutes the taking of property without due process of law and a denial of equal protection of the law, under tthe Constitution of the United States, Fourteenth Amendment.

IV. Statutes and Constitutional Provisions Involved

1. The Constitutional provisions involved in this case are:

a. Section 1 of The Fourteenth Amendment to the Constitution of the United States.

b. Section 5 of Article 16 of the Constitution of Arkansas, Appendix C, Page 34.

2. The Arkansas statutory provisions involved in this case are copied in Appendix C, Page 34 et seq.

V. Statement

1. Issues

The Arkansas Public Utility Tax Departments, Respondents herein, have, over the past few years, without changed conditions, increased petitioner's ad valorem taxes by enlarging assessments, shifting factors or the rate. For example, in 1956, petitioner's percentum investment to plant value was expanded from 18.81% to 20.12%. Said change increased petitioner's assessment over $500,000.00.[2]

The instant proceeding was instituted to curb the state agencies' arbitrary practice of imposing upon petitioner

[2] See Arkansas Assessment Coordination Department Exhibit 17, Page 162 of Transcript.

excessive taxes. The practice, petitioner contends, takes its property without due process of law, in violation of both the State and Federal Constitutions.

The Arkansas Supreme Court sustained petitioner's contention in part, but it is submitted additional material relief should have been granted.

Petitioner sought to reduce its ad valorem tax assessment of $4,330,680.00 for 1957 imposed by the Arkansas Assessment Coordination Department (hereinafter referred to as Department), and approved by the Arkansas Commerce Commission (hereinafter referred to as Commission). Petitioner charged said assessment was excessive, discriminatory and confiscatory, in violation of the State and Federal Constitutions hereinabove quoted, to the extent of $2,890,715.00.[3] The Arkansas Coordination Department in levying the assessment based same upon the so-called unit value of Petitioner's operating properties by determining an average of three different approaches to value; namely, (1) property, (2) capitalized income, and (3) the stock and funded debt approach.

In valuing Petitioner's property[4], the Department used the reconstruction cost new less depreciation estimate (hereinafter referred to as RCN-D), which said value was made as of December 31, 1955, by the Bureau of Accounts, Cost Finding and Valuation, of the Interstate Commerce Commission (hereinafter referred to as I.C.C.). To this value was added the I.C.C.'s estimated value of Petitioner's land and rights, as well as net plant additions for the year 1956. From said gross property valuation was deducted a portion of certain non-operating property values, carried in Peti-

[3] See K.C.S. Ex. No. 1, which is a comparison between assessment made bly the Arkansas Assessment Coordination Department and by Petitioner taxpayer.

[4] See K.C.S. Ex. No. 1, lines 1 through 16.

tioner's I.C.C. RCN-D Account, plus 12½% of the previous year's operating expenses and undepreciated book value of materials and supplies. Petitioner contended there should have been deducted 12½% from said gross property values for functional obsolescence plus 12½% for economic obsolescence, both of which were proven by uncontradicted evidence.

In arriving at the income approach value,[5] the Department capitalized the average of net railway operating income at an arbitrary 5.75%. Petitioner submits[6] said rate was improper. It contended the proper rate of capitalization should have been not less than 6.22%. The Department used the 5.75% composite capitalization rate compiled by the Committee of Unit Valuation of the National Association of Tax Administrators.[7] Petitioner proved the National Association of Tax Administrators' (hereinafter referred to as NATA) formula applied to Petitioner's operating characteristics, entitled it to a capitalization rate of at least 6.22%.[8] By eliminating improper elements from the formula, the proper rate should have been 8.12%.[8]

The Department, in arriving at stock and funded debt values,[9] used for Petitioner's common and preferred stock the New York Stock Exchange quotations at the close of business December 31, 1956. To this figure was added the funded debt, current liabilities and unadjusted credits. From the total, non-utility property values were deducted. Said method of valuation Petitioner challenged. It contended security values on the New York Stock Exchange

[5] See K.C.S. Ex. No. 1, lines 1 through 21.

[6] See K.C.S. Ex. "C", pp. 31 through 36; Tr. 84.

[7] See K.C.S. Ex. No. 7; Transcript pp. 84, 85; see footnote 26, *infra*.

[8] Tr. 91; see footnote No. 27, *infra*.

[9] See K.C.S. Ex. No. 1, lines 23 through 30.

should have been determined as of January 2, 1957; that current liabilities and unadjusted credits should not have been added thereto, since they were not debts within the meaning of the tax statutes;[10] that the Department erred in computing the market value of Petitioner's Louisiana & Arkansas Railway Company, a wholly owned, separately assessed non-operating or non-utility property, at $18,000,000.00 instead of $69,000,000.00; and in allowing only said $18,000,000.00 as a deduction in violation of the Arkansas law, since the Department found the 1957 valuation of said subsidiary for tax purposes was approximately $69,000,000.00.[11]

Said factors were considered together and divided by three in arriving at a figure which was alleged to be the unit value.[12]

The Department determined that 16.21% of said net value should be allocated to Arkansas. In so doing it used two challenged factors of gross revenue and all track. Petitioner contended the Department should have utilized instead, net income, because of Petitioner's peculiar geographic conditions in Arkansas, entailing high operating costs in addition to its extra expense necessitated by the State "Full Crew Law";[13] and furthermore that all track operated should not have been considered since it included tracks over which Petitioner had only operating rights, which were owned and taxes paid thereon by other railroads.

An appeal from the Department's ruling was duly perfected to the Pulaski County Circuit Court. From the Circuit Court judgment an appeal was duly taken to

[10] This contention was sustained by the Arkansas Supreme Court. See Opinion, Appendix A.

[11] See Tr. pp. 98, 99, and Ark. Stats. Ann. 84-606 (1947).

[12] See K.C.S. Ex. No. J, line 38.

[13] Ark. Stat. Ann. § 73-721 (1947).

the Arkansas Supreme Court on the following specifications of error:

1. Refusal to allow physical depreciation of $4,156,672 for 1956 from property concept.

2. Refusal to deduct economic and functional obsolescence aggregating $32,474,000 basically required to be deducted when using reproduction cost new less depreciation as an element of value.

3. Refusal to deduct full value of non-operating and separately assessed properties and I.C.C. Account 39 included in I.C.C. reproduction cost new less depreciation in the amount of $6,715,546 (only $3,765,825 was allowed).

4. Refusal to use I.C.C. calculation of working capital including material and supplies of $1,527,600 reported as a part of elements of value of property of Class I railroads (from which reproduction cost new less depreciation and land and rights value were obtained) and instead using an arbitrary estimate of $6,304,423.

5. Refusal to use proper rate for capitalization of net railway operating income (5.75% instead of 8.12%).

a. Current Liabilities at assumed yield of 2% erroneously included in relating securities to available income for calculation of rate of capitalization.

b. Erroneous use of composite capitalization rate of 5.75% instead of using characteristics pertinent to Petitioner available in calculation of said composite rate.

6. Refusal to deduct full or market value of non-operating properties from stock and funded debt element of value.

7. Refusal to use correct allocation factors for determining proportionate part of Petitioner's unit value situated in Arkansas, thereby taxing in Arkansas property taxable in other jurisdictions.

a. Refusal to deduct Petitioner's value destroyed in Arkansas by extraordinary expenses of operations over mountainous grades in Arkansas and expenses incurred in complying with Arkansas "Full Crew" law.

8. Refusal to require equalization of Petitioner's taxable property in Arkansas at the state average assessing ratio of 12.32% instead of the statutory 20%.

9. Refusal to eliminate current liabilities and unadjusted credits from determination of stock and funded debt element of value.

The Arkansas Supreme Court reversed the Pulaski County Circuit Court judgment in the following particulars:

1. (Item 1 above) Required the elimination of net plant additions for 1956 in the amount of $1,462,657 in lieu of a deduction of $4,156,672 for 1956 depreciation.

2. (Item 9 above) Ordered the elimination of current liabilities and unadjusted credits of $15,436,505 in determining the stock and funded debt element of Petitioner's unit value.

2. The Federal Question

Constitutional and Federal questions forming the basis of this Petition to this Honorable Court were urged be-

fore the state administrative agencies and courts as follows:

(a) Before the Arkansas Assessment Coordination Department by Petition for Review, Petitioner pointed out each particular of error committed by the Department, and further stated as follows: (Tr. 43)

> "Petitioner states that said assessment is erroneous in figures; that it is arbitrary in measuring, and that it is confiscatory in results, and constitutes a taking of the petitioner's property without due process of law, in violation of Section 1 of the 14th Amendment to the Constitution of the United States, and in violation of Article V, Section 16 of the Constitution of the State of Arkansas."

(b) Before the Arkansas Commerce Commission, Petitioner alleged every error complained of, then specifically alleged: (Tr. 54)

> "Petitioner states that said assessment fixed by the Director is erroneous in figures; that it is arbitrary in measuring, and that it is confiscatory in results, and constitutes a taking of the petitioner's property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States, and in violation of Article V, Section 16 of the Constitution of the State of Arkansas."

(c) In the Pulaski County Circuit Court in Petition for Review, Petitioner alleged each error in the assessment, then specifically alleged: (Tr. 10)

> "By reason of the foregoing, the order and decision of the Arkansas Commerce Commission, aforesaid and the assessment of the Arkansas Assessment

Coordination Department is in violation of the rights of the petitioner-appellant under the applicable statutes of the State of Arkansas, and under the Constitution of the State of Arkansas, and is in violation of the rights of petitioner-appellant under the due process clause of the 14th Amendment to the Constitution of the United States, and denies the petitioner-appellant equal protection of the laws guaranteed to petitioner-appellant under the 14th Amendment to the Constitution of the United States."

(d) In the Arkansas Supreme Court Petitioner renewed each alleged error, and charged that said errors violated Petitioner's rights guaranteed by Section 1 of the 14th Amendment to the Constitution of the United States; and in Petiion for Rehearing (Tr. 382) the Federal questions were again raised as follows:

"In Appellant's briefs in the case we attempted to direct the Court's attention to the undisputed evidence supporting the errors mentioned, and fortify the argument with abundant authority. Appellant submits that the errors specified result in confiscation of its property, without due process of law; and that Appellant has been denied guarantees from such result by both the Arkansas and United States Constitutions."

VI. Reasons For Allowance of Writ

1. Error in Failing to Allow Depreciation of I.C.C. Reproduction Cost New Less Depreciation for Year 1956

The I.C.C. appraisal of RCN-D as of December 31, 1955,[14] was used to establish road and equipment values as of January 1, 1957, and no depreciation was allowed on Petitioner's road and equipment property for the year 1956, which obviously had been depreciated by use.[15] Therefore, Petitioner's properties absorbed by depreciation for one full year were taxed. This arbitrary taxing of a non-existent asset resulted in confiscating Appellant's property by tax exaction, in violation of Section 1, 14th Amendment to the United States Constitution.

2. Error in Refusing to Direct Deduction of Economic and Functional Obsolescence

Uncontradicted record evidence established that in excess of 12½% of Petitioner's physical properties were lost by economic obsolescence;[16] and in excess of 12½% abolished by functional obsolescence.[17] The Department, as well as

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[14] Tr. 119.

[15] Tr. 67. The I.C.C. recognizes and allows depreciation on road and equipment account at the rate of 3.2% per annum. This depreciation has only been allowed since 1943. See Tr. 69.

[16] See K.C.S. Ex. Nos. 5B1, 5B2 and 23 through 28.

[17] K.C.S. Ex. No. 5 reflects miles of branch line producing less than 500,000 tons of revenue traffic per year. K.C.S. Ex. No. 5A1 reflect estimate of obsolescence of Petitioner's road and equipment account of 14.46%. See Tr. 72. K.C.S. Ex. No. 5A2 reflects estimate of properties that would not be rebuilt, thus establishing obsolescence in the amount of 63% for stations and office buildings; 52.40% of roadway building and 55.33% of shops and engine houses. K.C.S. Ex. No. 5 is a study establishing that 4.22% of Petitioner's total branch line trackage is obsolescent. K.C.S. Ex. No. 6 reflects Exs. 9 and 10 introduced in I.C.C. hearing wherein I.C.C. determined that the book value of Petitioner's

the State Court, inferentially recognized functional and economic obsolescence of physical property,[18] but arbitrarily disregarded the evidence and assessed non-existent property. The law directed the Department to determine the value of Petitioner's properties . . . "as set up by officers or agents of such companies as a basis for the adjustment of rates or charges for service to the public . . ."[19]

In recent years the Interstate Commerce Commission has consistently refused to consider the cost of reproduction of physical properties in estimating public service property values for rate making purposes. It has decreed that, "No prudent man would consider reproducing properties on the basis of extremely high reproduction cost estimates."[20]

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properties were over-valued in the amount of $50,988,852.10. Petitioner maintained a roundhouse at one of its division points at DeQueen, Arkansas, prior to the advent of the Diesel locomotive. With the coming of the Diesel locomotive, this roundhouse and all of its facilities still existing are now obsolete. Furthermore, substantial shop facilities existing at Pittsburg, Kansas, which were built to accommodate steam locomotives would not be rebuilt now with the Diesel locomotive in use. The facilities are obsolete. Tr. 255.

[18] See Appendix A, Opinion of Supreme Court of Arkansas. Tr. 372, 373.

[19] Ark. Stats. Ann. § 84-606 (1947). (Appendix C).

[20] *Increased Freight Rates*, 284 I.C.C. 589, 608 (1951). The NATA 1944 Report to Congresssional Committee recognized existing obsolescence of railroads in general had been underestimated in arriving at ad valorem assessments. See 54 Stats. at Large 953, House Document 160. The Court of Appeals, in *Bailey v. Megan*, 102 F.2d 651, 655, disapproved the use of RCN-D as an element of railroad unit value because of existing obsolescence. Compare: *Great Northern Ry. Co. v. Weeks*, 56 S. Ct. 426, 297 U.S. 151, 80 L. Ed. 532. NATA now recognizes existence of obsolescence. U.S. Ex. No. "C" at pp. 58 and 59. See, also, *Knoxville v. Knoxville Water Co.*, 29 S. Ct. 148, 212 U.S. 1; *Hazeltine Corp. v. Commissioner of Internal Revenue*, 89 F.2d 513; *Idaho Power Co. v. Thompson*, 19 F.2d 547; *Public Market Co. v. City of Portland*, 170 P.2d 586; *Chicago & Northwestern Ry. Co. v. Department of Revenue*, 128 N.E.2d 722; *Attorney General v. Trustees of Boston Elevated Ry. Co.*, 67 N.E.2d 676; *Iowa-Illinois Gas & Electric Co. v. City of Fort Dodge*, 85 N.W.2d 28; 73 C.J.S. 1042.

Moreover, in assessing other Arkansas properties, taxing authorities are directed by the Department's Assessors' Manual to make allowances for functional and economic obsolescence; and the Department has inferentially admitted and the Court below has so recognized that functional and economic obsolescence should be considered in property valuations for ad valorem tax purposes.[21]

Petitioner submits the failure to remove from the property value, proven and existing functional and economic obsolescence, deprives it of constitutional rights guaranteed by Section 1 of the 14th Amendment, in that it is taxed on non-existent property value.

3. Error in Refusing to Deduct the Full Market Value of Non-Operating Properties.

Certain non-operating properties, wholly owned, separately assessed, and located outside the State of Arkansas, have been included in the estimated cost of reproduction cost new less depreciation, as well as I.C.C. Account No. 39, Public Improvements-Construction determined by the I.C.C.[22]

Only a fractional amount of the market value of said

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[21] § 5 of Act 153 of Ark. Acts, 1955, imposed the duty upon Arkansas assessors to follow the Assessment Manual and Standards promulgated by the Arkansas Assessment Coordination Department. The Department under said Act was directed to promulgate and publish the "Assessor's Manual" as the official guide to Arkansas assessing authorities in valuating properties for ad valorem tax purposes. K.C.S. Ex. "A" is a reproduction of pertinent parts of the Assessor's Manual relating to functional and economic obsolescence, which directs the assessor to take obsolescence into consideration in arriving at assessed values.

[22] K.C.S. Ex. No. 4 reflects value of non-operating properties and I.C.C. Account No. 39, Public Improvements—Construction, which reflects special exactions for public improvements. I.C.C. accounting rules require special assessments exacted by various taxing authorities to be carried in I.C.C. Account No. 39, even though the same is not a capital asset of the railroad company. See Tr. 80.

properties was deducted from the RCN-D;[23] and thereby, the Department again was permitted to flagrantly violate Appellant's Constitutional rights.

4. Error in Including Improper Working Capital and Materials and Supplies

The Department took the Interstate Commerce Commission, Bureau of Accounts, Cost Finding and Valuation report of RCN-D, which report also determined the working capital including materials and supplies, in assessing Petitioner's properties. However, in resorting to an arbitrary figure of 12½% of Petitioner's previous year's operating expenses for working capital including the book value of material and supplies, the Department ignored said value estimate by not excluding depreciation, scrap or obsolescent material. The evidence established that the book value of said accounts was not refined to remove scrap and obsolescent materials or supplies.[24] Said determination of working capital and supplies was arbitrary and resulted in confiscation of Petitioner's properties.

5. Error in Failing to Use the Proper Rate of Capitalization in the Income Approach to Value

A rate of capitalization producing an income value in excess of actual cost of reproducing properties in their 1957 condition as found by the assessing authorities on

[23] See K.C.S. Ex. No. 1, lines 11 and 12.

[24] See Tr. pp. 80 through 83. In *Northampton & Bath RR. Co.*, 149 I.C.C. 241, 265, 272, the I.C.C. sets forth method for calculation of working capital, including materials and supplies. The I.C.C. determination of working capital, including materials and supplies, is used for rate making purposes. *Ex Parte No. 200*, 300 I.C.C. 633. Some authorities are of the opinion that railroads need no working capital because monthly cash receipts are more than sufficient to meet monthly outgo. William H. Lough, "Business Finance", p. 378.

January 1, 1957, was unreasonable.[25] Use of the 5.75% capitalization rate was "lifted" from a formula figure prepared by the NATA.[26] The fantastic rate was utilized on the assumption that current liabilities yielded 2% interest. It is elementary that current liabilities could earn no rate of return.

Applying Petitioner's operating characteristics to the NATA formula Petitioner's capitalization rate as a matter of fact would be 6.22%.[27] Said computation results from capitalizing net income on a five year average after payment of income taxes.

Elimination of improper elements from the formula conscripted by Respondents, would increase Petitioner's rate of capitalization to 8.12%.[28] Arkansas assessing authorities are directed by the Department (Assessors' Manual P. 165; Petitioner's Ex. A) to capitalize at the rate of 7% in determining income value of similar properties at the local level. Therefore under the assessment made herein, Petitioner was denied equal protection of the law and was grossly discriminated against.

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[25] *People ex rel. D.L. & W.R.R. Co. v. Clapp*, 152 N.Y. 490.

[26] See K.C.S. Ex. "C", pp. 31 through 36; Tr. 84.

[27] See K.C.S. Ex. No. 7. In applying the "income available" to the NATA formula to arrive at the 6.22% capitalization ratio, there has been no deduction for dividends on investments in subsidiaries, value of stock issued to purchase the L & A Ry. Co.; interest paid on bonds secured by investment in subsidiaries and a portion of mortgage secured by investments in subsidiaries.

[28] See K.C.S. Ex. No. 7. In arriving at the 8.12% capitalization rate, there has been excluded from the income available dividends on investments in subsidiaries, value of stock issued to purchase the L & A Ry. Co., interest paid on bonds secured by investments in subsidiaries and a portion of mortgage secured by investments in subsidiaries, since these subsidiaries are separately assessed for ad valorem taxes by either Arkansas or other taxing jurisdictions. Consequently, the income available for the above should be refined to take therefrom monies properly attributable to subsidiaries already taxed for ad valorem purposes.

The Department rate used was arbitrary and unrealistic, and resulted in the taxing nonexisting properties.

6. Error in Failing to Exclude the Full Value of Non-Operating Separately Assessed Properties from Stock and Funded Debt Approach

The Department allowed a deduction of only $39,000,000.00 from the stock and funded debt approach in valuing for 1957 Petitioner's separately assessed and non-operating properties. The Department included in said value only a portion of the 1957 ad valorem tax value of Petitioner's wholly owned subsidiary, the Louisiana & Arkansas Railway Company, at approximately $69,000,000.00.[29] In deducting only $39,000,000.00 from the stock and funded debt in valuing all Petitioner's separately operated and assessed properties, the Department valued in violation of the law,[30] the Louisiana & Arkansas Railway Company at only $18,000,000.00. Thus, a double tax was imposed upon Petitioner's property valued at approximately $600,000,00.[30] Since a value of approximately $69,000,000.00 as found by the Arkansas Court was allocated to Petitioner's Louisiana & Arkansas subsidiary, and a deduction of only $18,000,000.00 allowed for Louisiana & Arkansas stock ownership. Petitioner was denied a deduction of $51,000,000.00 from its Stock and Funded Debt values.

The Arkansas Supreme Court, referring to the amount of said Louisiana & Arkansas deduction, said (*KCS Ry. Co.*

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[29] See K.C.S. Ex. No. 13, which is a reproduction of the Department's work sheet calculating the unit value of the Petitioner's wholly owned subsidiary, the Louisiana & Arkansas Railway Company, for ad valorem tax purposes for 1957, wherein unit value for the L&A is established by the Department at $69,426,225.00.

[30] Tr. 99, and Ark. Stats. Ann. Sec. 84-606 & 610 (1947) (See Appendix C) L&A Arkansas property on which taxes paid was assessed at $660,000.00. The duplicate value of said L&A property included in the taxable value of Petitioner amounts to $553,336.

v. *Ark. Commerce Commission et al.*, 323 SW (2) 193 (@ 197),

> "The L&A pays taxes on a valuation of $69 Million. The Department allowed a valuation of $18 Million on L&A. It is the contention of the Department that Appellant is entitled to only a deduction for the value of the L&A stock owned by Kansas City Southern. The Department reached the correct conclusion. Insofar as L&A is concerned KCS owns only the stock" . . . and . . . "only the value of what KCS owns should be deducted."

Petitioner submits that since all Louisiana & Arkansas stock is owned by the Kansas City Southern, and since the Court found the Louisiana & Arkansas property value to be $69,000,000.00, the stock necessarily had a value of $69,000,000.00. Although the Arkansas Court found said Louisiana & Arkansas stock value to be $69,000,000.00, it permitted a deduction of only $18,000,000.00.

It is respectfully insisted that the Court erred in so restricting its deduction under the Arkansas law (Ark. Ann. Stats. 84-606 & 610). Said law required the deduction of a sum representing the net worth of Louisiana & Arkansas stock, or $69,000,000.00. Therefore, Petitioner is entitled to an additional deduction of $51,000,000.00 in computing its stock and funded debt value (the difference between $18,000,000.00 and $69,000,000.00); and the Court's action in denying said additional allowance, deprives it of property without due process of law.

7. Error in Failing to Use Correct Allocation Factors to Allocate Arkansas' Portion of Appellant's Unit Value

In determining the allocation factor of 16.21%, the Department took an average of gross revenue, all track, car and locomotive miles, and investments.[31] Uncontradicted evidence established that because of the mountainous terrain in Arkansas traversed by Petitioner, its North and South bound trains were capable of handling only 7504 tons per train, as compared to a system average of 9636 tons.[32] The effect thereof requires that trains be broken approximately in half in order to negotiate mountainous areas in the State, thus necessitating annually 879 extra trains, entailing a cost of approximately $180,728.00 for the year 1956.[33]

Furthermore, the evidence established that Arkansas has a Full Crew Law,[34] requiring extra brakemen on trains of more than 25 cars. The law and resulting expense is peculiar to Arkansas, and not required in other states in which Petitioner operates. The cost of extra brakemen in Arkansas for the year 1956 was $118,240.00.[35] In addition, for the year 1956, Arkansas contributed only 9.8% of Petitioner's originating tonnage, and only 2.97% of its terminating tonnage, for an average ratio of originating and terminating tonnage, of 6.42%.[36] The proof established other pertinent economic factors in the State area through

[31] See K.C.S. Ex. No. 1, lines 47 through 51.

[32] See K.C.S. Ex. Nos. 20 and 21.

[33] See K.C.S. Ex. No. 16.

[34] Ark. Stat. Ann. § 73-721 (1947).

[35] See K.C.S. Ex. No. 18. The value of Petitioner's property destroyed by reason of the so-called Arkansas Full Crew Law and additional costs of operating its trains over mountainous terrain in Arkansas was $3,681,871.00 for the year 1956. See K.C.S. Ex. No. 19A.

[36] See K.C.S. Ex. No. 22.

which Petitioner's line runs which were ignored by the Department. In the five year period immediately prior to its assessment, Arkansas lost 5% of its population.[37] The per capita income in said area was 42.50% below the national average.[38] Mineral production values in the State were only .94% of the entire national production, ranking Arkansas next to the lowest of any state Petitioner serves.[39] Produced manufactured goods values were the lowest of any state served by Petitioner;[40] the State farm income was one of the nation's lowest and counties served by Petitioner represent only 8.45% of the State's population.[41]

Said geographic and economic factors should have been considered in allocating Petitioner's system value to Arkansas, since "a segment of line may operate under handicaps resulting from the nature or traffic, the topography of the country, the maladjustment or inadequacy of passengers or freight tariffs in one district or another". *Norfolk & Western R. Co.* v. *No. Carolina*, 297 U.S. 682.

Because of these uncontradicted facts net rather than gross revenues should have been used in computing Petitioner's Arkansas assessment, as well as originating and terminating traffic. Otherwise the State imposes taxes on properties in other jurisdictions, thereby extending taxing powers beyond the State border to properties assessed in other jurisdictions.

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[37] See K.C.S. Ex. No. 23.
[38] See K.C.S. Ex. No. 24.
[39] See K.C.S. Ex. No. 25.
[40] See K.C.S. Ex. No. 26.
[41] See K.C.S. Ex. No. 27.

8. Error in Failing to Equalize Petitioner's Assessment to the Average Ratio of Other Assessments in the State

Although the law requires assessments be equalized at 20% of the market value, it was not adhered to. The average State assessing ratio in 1956 was 12.32%.[42] The 1955 Arkansas Legislature,[43] recognized the inequality of assessments, and by law set up certain penalties for local

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[42] Tr. 108, 115, 116.

[43] § 12, Act 153, Ark. Acts, 1955, directed the preparation of a ratio study by the Arkansas Assessment Coordination Department and directed that the withholding of state aid or turnback from all sources accruing to counties, municipalities and school districts in failing to reach an assessing ratio of 18% for the year 1958. This ratio study was not completed until August 15, 1958, at which time it was published and released by the Arkansas Assessment Coordination Department, "*Arkansas Ratio Study 1958*" and based upon this study as of that time, the assessing ratio throughout the state was 15.37% and the director in said calculations recited that all utilities had been assessed at 20%.

Act 242 of Ark. Acts, 1959, amended § 12 of Act 153, *supra*, and the local assessing authorities were given until August 1, 1959, to place in the tax records the real and personal property at eighteen per centum (18%) of the true and full market value for the assessment year 1959 and until the year 1960 to raise same to twenty per centum (20%) of the full market value. Again, in 1959, in § 45 of said Act 244, the Legislature found and declared:

> "It has been found and is hereby declared by the General Assembly of the State of Arkansas that great inequalities and discriminations in property assessments now exist throughout the State, that there is urgent need for equalization, and that only by the enactment of this bill can there be provided a more efficient and adequate administration of the tax laws. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from and after the date of its passage and approval."

If all other properties were required to be on the tax records at no greater ratio than 18% in the taxable year in question, certainly, Petitioner should have been entitled to the same treatment and the acts of the Respondents in equalizing Petitioner's assessment at 20% amounts to a denial of equal protection of the laws and results in a confiscation of its properties without due process of law, all as guaranteed it by the Federal Constitution.

governmental agencies, if assessment ratios were not raised. However, a 1957 law, in effect, allowed county assessments to remain at 18% until 1958. An official study, made pursuant to law by the Director of the Department released August 15, 1958, established that the average state ratio as late as August 15, 1958, was only 15.37%.[44] By equalizing Petitioner's assessment at 20% of value, while the 1957 state ratio was only 12.32%, denied Petitioner rights guaranteed under the Federal Constitution, the 14th Amendment, Section 1. The Arkansas Constitution, Article 16, Section 5, also requires uniformity of assessments. It is submitted that state agencies denied the Petitioner the equal protection of the laws, by refusing to assess its property on the ratio generally in effect. This Court in the case of *Cummings* v. *National Bank*, 101 U.S. 153, declared that most states have constitutional provisions requiring uniformity in assessments; that failure to equalize Petitioner's property at the average state ratio results in substantial injustice, denies Petitioner the equal protection of the laws, and confiscates its properties without due process.

[44] *Supra*, Note 42.

Conclusion

It is submitted that the Arkansas Supreme Court in the respects above set forth has sanctioned a departure in assessing Petitioner's properties that results in confiscation without due process of law, and denies it equal protection of the laws, both of which are guaranteed by Section 1 of the 14th Amendment to the Constitution of the United States.

Respectfully,

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APPENDIX

APPENDIX A

SUPREME COURT OF ARKANSAS

No. 1813

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLANT,

v.

ARKANSAS COMMERCE COMMISSION, ET AL., APPELLEES

Opinion Delivered, April 13, 1959

Appeal from Pulaski Circuit Court, Third Division

Reversed

SAM ROBINSON, Associate Justice

This case involves the proper valuation of the property of appellant, Kansas City Southern Railway Company, in the State of Arkansas for ad valorem tax assessment purposes. The valuation as corrected by the Arkansas Commerce Commission, hereinafter referred to as "Department", was placed at $4,330,680. On appeal to the circuit court the valuation found by the Department was affirmed and the Railroad Company has appealed to this Court, contending that the proper valuation is only $1,439,965.

The formula used by the Department in determining the correct valuation of the Railroad Company property for ad valorem tax purposes consists in the average of three different methods of ascertaining the value of the property. (1) There is what is known as the RCN-D method, meaning Reconstruction Cost New minus Depreciation, the value arrived at by this method being furnished to the Department by the Interstate Commerce Commission; (2) there is the method of adding the market value of the corporate stock to the funded debt, it being considered that the total assets equal the stock and debts; and (3) there is the method of capitalizing the net income, which is to consider the average net earnings of the company over

a period of years and then estimate the total value of the assets as being such an amount as will produce a fair return on the value of the property. In this case the Department placed the total capitalized value of the railroad property at a sum which would yield 5.75% per annum after income taxes had been paid. The Railroad contends that the capitalized value should be such a sum as would yield 8.12%. Of course, if this rate of return were used, the capitalized value would be much less than such value when a 5.75% rate of return is used. The Railroad Company does not complain of the formula used in reaching the total valuation, but does stoutly contend that the Department made serious mistakes in reaching the total of each of the three parts of the formula.

First, with regard to the RCN-D: The valuation reached by the Department is $136,187,875. The Railroad says that it should be $132,031,203, or $4,156,672 less than the value found by the Department. The Railroad contends that the RCN-D figures furnished to the Department by the I.C.C. fail to take into consideration 3.2% depreciation for the year 1956—the year immediately preceding the assessment year—although net plant additions for that year totaling $1,462,657 were added to the valuation.

The appellee answers this point by saying: "In response appellees point out that while no depreciation was shown for 1956, neither was appreciation shown." And appellee further says: "It would seem that if it (the Railroad) sincerely believed it were entitled to depreciation, it should have submitted to the Commission a statement showing what the net plant additions were, the date of the addition, and the rate and amount of depreciation which they claim should be allowed. This was not done." The record shows that the Railroad Company did contend that it was entitled to 3.2% depreciation for 1956. The record further shows a net plant addition for 1956 of the value of $1,462,657. The Department accepted the Railroad Company's figure on the net plant addition, but refused to allow any depreciation for 1956. Appellee suggests that this Court take judicial knowledge that the I.C.C. valuation at the end of 1956 was some $11,500,000 greater than the valuation

shown at the end of 1955. We do not think; however, that the valuation placed on a railroad by the I.C.C. on a particular date is a matter of such common knowledge or universal notoriety that this Court should take judicial knowledge of it. The fact remains that the Department was computing the valuation of the railroad for the tax year of 1956; certainly the Railroad had some depreciation of its property during that year, and it was given credit for none. However, the Railroad was charged with new additions of $1,462,657. In view of the fact that no depreciation was allowed for the year in question, we do not think that the $1,462,657 should have been added to the valuation.

The Railroad contends that 25% should be deducted from the RCN-D value because of functional and economic obsolescence. It is claimed that if the Railroad were to be reconstructed only 37% of the stations and office buildings would be required; that only 47.60% of other buildings would be needed and there would be reconstructed only 44.67% of its shops and engine houses, etc.; that 500,000 net tons of revenue traffic per year is obsolescent and unprofitable; and 4.22% of its total system trackage is obsolescent; that a total of 25% of its property is obsolescent due to functional and economic factors. Undoubtedly functional and economic obsolescence is reflected in both the stock-plus-funded-debt method and the capitalized earnings method of valuation. In both of these methods the Railroad received the benefit of both functional and economic obsolescence. In 1944 a report of the National Tax Association made to a Congressional Committee said: "It is largely because earnings and stock and bond values reflect the obsolescence which railroads have suffered as a result of over-optimism and the advent of competitive transportation agencies that they are regarded as the most reliable evidence of unit value." And in *Bailey* v. *Megan*, 102 F. 2d 651, it is said: "A computation of system value based upon average market price of stocks and bonds and a computation based upon a capitalization of net earnings reflect the effect, upon actual value, of obsolescence,

of the competition of other means of transportation, and of all factors affecting earnings."

If the functional and economic obsolescence is deducted from the RCN-D valuation, such deduction would have to be considered in connection with the other two methods of arriving at a proper valuation. It would hardly be fair that such obsolescence be used where it is to the Railroad Company's advantage, but not be used in an approved formula when to the disadvantage of the Railroad. If the RCN-D value were the only method used in arriving at the valuation for tax purposes, perhaps the deduction for obsolescence would be required. But it must be remembered that this method is only one part of a three-part formula, and the obsolescence is reflected in two of the parts to the advantage of the Railroad. The RCN-D valuation is considerably more than the stock and debt value, but it is only slightly more than the income value. According to appellant's contention with regard to functional and economic obsolescence, the RCN-D value should be about $30 million less than the income value and about $15 million less than the stock and debt value. Such value contended for by appellant apparently would be out of all proportion to the real value as reflected by the other parts of the formula used.

With reference to the RCN-D value as a proper part of a formula to determine the valuation for tax purposes, this Court said, in *St. Louis-San Francisco Ry. Co. v. Ark. Public Service Commission*, 227 Ark. 1066, 304 S.W. 2d 297: "Is this method—of cost value, capitalized earnings value, and stock and debt value—a fair 'yardstick' to determine the system value of Frisco's property? Frisco claims that the cost value is overweighted and that it should be given little, if any, consideration; and Frisco also claims that some of the other factors in the 'yardstick' have been overemphasized. We hold that the 'yardstick' used by the Commission in determining the system value of Frisco in this case is fair and not arbitrary. It is undenied that such a 'yardstick' has been used by the Commission heretofore, and that such a 'yardstick' is used in other states. One such case is that of *Chicago & Northwestern Ry. Co.*

v. *Department of Revenue*, 128 N.E. 2d 722, decided by the Supreme Court of Illinois in 1955, with *certiorari* denied by the U.S. Supreme Court, 351 U.S. 950. This is not the only 'yardstick' that could be used, but it is fair and equitable. As Mr. Justice Butler said, in 1934, in *Rowley v. Chicago & Northwestern Ry. Co.*, 293 U.S. 102, 79 Law Ed. 222, 55 S. Ct. 55, in discussing the assessment of railway properties by the State of Wyoming: 'The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property.'"

Appellant says that the Department was in error in refusing to deduct from the RCN-D valuation certain properties which it claims are non-operating, and certain improvements. The Department did allow a deduction for some non-operating properties and on the others mentioned there is substantial evidence that they are not to be classed as non-operating, and that public improvements were deducted. Appellant maintains that the Department charged the Railroad with a working capital of $3,168,476, which is 12½% of its operating expenses for the previous year, the amount needed by the Railroad for a 45 day period, and that as a matter of fact it actually requires no working capital, because its daily revenues are sufficient to meet its needs in that respect. Whether the Railroad needs working capital is a question of fact. Evidence was introduced to prove that the same method of determining the required amount of working capital is used for every Class I railroad in the State, and we cannot say that the Department was in error in the finding that some working capital is required for Class I railroads.

Appellant next argues that 5.75% should not be used as a capitalization rate. In the Frisco case, a 6% capitalization rate was approved, and this was before taxes. Here, the 5.75% rate is after taxes. If 6% before taxes

was reasonable in the Frisco case, certainly it cannot be said that in the case at bar 5.75% after taxes is not justified.

The next point raised by appellant is that the Department erred in failing to exclude current liabilities and unadjusted credits from the stock and funded debt method of determining value, and we think appellant must prevail on this point. Included in the stock and funded debt valuation are current liabilities and unadjusted credits. Ark. Stat. '84-606 provides that the assessing authorities "shall ascertain as nearly as it can and shall consider the market or actual value of all outstanding capital stock and funded debt." The current liabilities and unadjusted credits in question are not part of the funded debt. They consist of such items as "traffic and car service balances between appellant and various other companies, audited wages and miscellaneous accounts payable, which include employees' payroll allotments for U.S. Savings Bonds, and various prudentially accrued taxes, both federal and state, and employees' withholding taxes, railroad retirement, etc., interest matured but unpaid on bonds which have been called as far back as 1945, but holders of some coupons have not been located and they cannot be paid by the trustee who holds the funds in New York," etc. Appellee points out "that under the provisions of '84-605 the Department is directed to include in the valuation every element that adds value to the property." We fail to see how current liabilities and unadjusted credits can be considered as adding value to the railroad. Just the opposite effect would appear to be more reasonable. The fact that an engineer or conductor had not cashed his check does not make the railroad worth more.

Appellant owns practically all of the stock of the L. & A. Railroad, which is a separate corporation and is assessed and pays taxes as such. The L. & A. pays taxes on a valuation of $69 million. Since L. & A. pays its own taxes, appellant says it (Kansas City Southern) should have a credit to the extent of the full value on which L. & A. pays taxes, namely, the value of $69 million. The Department allowed a valuation of $18 million on L. & A.

It is the contention of the Department that appellant is entitled only to a deduction for the value of the L. & A. stock owned by Kansas City Southern. The Department reached the correct conclusion. Insofar as L. & A. is concerned, Kansas City Southern owns only the stock. If Kansas City Southern had to pay taxes on this stock, certainly it would have to pay only on the value of the stock. But, since Kansas City Southern does not have to pay taxes on the L. & A. stock, the Department having classed it as a non-operating asset, only the value of what Kansas City Southern owns should be deducted, and that is the value of the stock.

The Department allocated to Arkansas 16.21% of the value of the railroad property. Appellant says the proper allocation figure is 13.41%, and argues that there are certain factors which render the Arkansas property less valuable than appellant's property located in other states. Appellant contends that Arkansas has a "Full Crew Law"; that appellant is required to move its trains across a mountainous terrain in Arkansas; that Arkansas is responsible for only 9.88% of the originating tonnage, and only 2.97% of the terminating tonnage; that Arkansas has lost in population, where other states have gained; that the per capita income of Arkansas is low compared to other states.

In the case at bar, the Department used the same method in allocating value as used in arriving at the valuation of all of the railroads in the States and this method was approved in the Frisco case, and, as pointed out in that case, the ascertainment of the value of the railroad system is not governed by any fixed and definite rule. Finally, appellant contends that the Department erred in equalizing appellant's unit value at 20%; that other property in counties in which appellant operates is assessed from a low of 13.82% to a high of 18.08%; that all utilities have been assessed at 20%. In the Frisco case, we said: "We recognize that obtaining a fair assessment of property has been a serious problem in this State for many years; but we know that considerable headway has been made toward more equitable assessments. Act No. 153 of the

Legislature of 1955 shows the labor that the State is undertaking in this regard; and in §4 of that Act the same figure of 20% is used. Some classes of property in Arkansas are assessed at more than 20%; other classes are assessed at less than 20%; but the State is striving for a 20% figure. In this case Frisco has failed to show either that the Commission was in error in fixing the figure at 20%, or that the said figure was arbitrary, or that the said figure would result in confiscation." Likewise, in the case at bar we do not think the appellant has shown that the Department was in error or that a basis of 20% would result in confiscation.

Because the $1,462,657 in new additions for 1957 should be deducted, and because there should be deducted from the valuation the current liabilities and unadjusted credits, the judgment of the circuit court affirming the Department's finding of valuation is reversed, with directions to remand the cause to the Department so that a valuation consistent herewith can be determined.

APPENDIX B

IN THE SUPREME COURT OF ARKANSAS

NOVEMBER TERM, 1958

Proceedings of May 11, 1959

No. 5-1812

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

ARKANSAS COMMERCE COMMISSION, ET AL., APPELLEES

ORDER

Rehearing denied, May 11, 1959

APPENDIX C

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Constitutional provisions involved in this case are:

a. Section 1 of The Fourteenth Amendment to the Constitution of the United States.

b. Section 5 of Article 16 of the Constitution of Arkansas:

"All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges, in such manner as may be deemed proper. Provided, further, that the following property shall be exempt from taxation: Public property used exclusively for public purposes; churches used as such; cemeteries used exclusively as such; school buildings and apparatus; libraries and grounds used exclusively for school purposes; and buildings and grounds and materials used exclusively for public charity."

2. The Arkansas statutory provisions involved in this case:

a. 84-606. Method of valuing property.—"The valuation of the property of all persons, firms, companies, co-partnerships, associations and corporations required by law to be assessed by the Commission shall be made upon the consideration of what a clear fee simple title thereto would sell for under conditions under which that character of property is usually sold. As evidence tending to show what this would be

the Commission, in so far as other evidence and information in its possession does not make it appear improper or unjust for it to do so, shall ascertain as nearly as it can and consider the market or actual value of all outstanding capital stock and funded debt and the income of such companies, and also the estimated investments and valuation of said property as set up by the officers or agents of such companies as a basis for the adjustment of rates or charges for service to the public by such companies, and such other information as to value the Commission may obtain. (Acts 1927, No. 129, Art. 18, p. 400; Pipe's Dig., Art 2044.)

b. 84-610. Assessment—Apportionment of assessed value to counties and districts.—"The Commission shall assign or apportion the assessed value of the property of all persons, firms, companies, co-partnerships, associations and corporations, which it is required to assess, in the following manner:

There shall be deducted from the true market or actual value of the entire property, tangible and intangible, ascertained as in this act (Arts. 84-601—84-613) provided, the true market or actual value, as ascertained from the information furnished by report, or otherwise, of all real and personal property of such company not used in its business as a public utility, and the remainder shall be treated as the true market or actual value of all its property, tangible or intangible, actually used or employed in its public utility business.

The Commission shall then ascertain and fix the value of the total utility operating property, tangible and intangible, in this State by taking such proportion of the true market or actual value of the entire operating property, tangible and intangible, of such company, actually used in its public utility business, as its total lines within this State bear to the total lines both within and without this State, or

as its total receipts or income from operation within this State bear to its total receipts or income from operation both within and without this State, or by using such other recognized method, or combination of methods, as will, in the judgment of the Commission, result in a just and equitable apportionment to this State of its due proportion of the value of the total utility operating property.

When the value of the total utility operating property, tangible and intangible, in this State has been determined; or when the property and operations of such company is wholly within this State, there shall be assigned or apportioned to the several counties, towns, school districts and other taxing districts through or in which such company operates the value of all real estate and all tangible personal property which had a fixed situs therein on the first day of January of the current tax year; and the remaining part of the assessment, if any, shall be assigned or apportioned among the several taxing districts in proportion to the value of the tangible property assigned or apportioned thereto. Provided, that the value assigned to rolling stock of street, suburban or interurban railroad, railroad and bus line companies shall be apportioned among the several counties, towns and school districts through or in which such company operates in proportion to the mileage operated therein, and provided, further, that the value of the personal property of any express or sleeping car company shall be apportioned among the several counties, towns, and school districts through or in which such company operates in proportion to the mileage operated therein. (Acts 1927, No. 129, Art. 22, p. 400; Pope's Dig., Art. 2048).

Section 12 (C) Act 153, Arkansas Acts 1955:

"In accordance with such determination of the average ratio of assessed value to the true and full market or actual value of all property in any county

annually, a portion of all State aid or turnback from all sources accruing to such county, all municipalities and school districts therein during the current fiscal year shall be withheld by the fiscal officials that disburse all state aid or turnback from all sources if the average ratio of assessed value to true and full market or actual value in any county is certified to be less than eighteen per centum (18%) for the year 1958, and twenty per centum (20%) for the year 1959 and each year thereafter. The amount to be withheld in each instance shall be that percentage of the total amount of state aid or turnback that would otherwise be paid that is determined by dividing the percentage of the true and full market or actual value outlined above for the respective years into the difference between said percentage and the average ratio of assessed value in the County as certified by the Assessment Coordination Department for the corresponding years. In the event, however, that any unit of government so affected can make proper showing to the Assessment Coordination Department in any applicable year between August 1 and December 15 that the property in such unit of government is assessed at eighteen per centum (18%) of true and full market value or actual value for the year 1958 and thereafter at twenty per centum (20%) of the true and full market or actual value for the year 1959 and subsequent years, then upon recertification by the Department to the proper fiscal officers of the State, there shall be no withholding of funds from such affected unit of government."

Section 15, Act 153, Arkansas Acts 1955:

"It has been found and is hereby declared by the General Assembly of the State of Arkansas that great inequalities and discriminations in property assessments now exist throughout the State, that there is urgent need for equalization, and that only by the enactment of this bill can there be provided a more

efficient and adequate administration of the tax laws. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from and after the date of its passage and approval."

(6377-6)

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AUG 19 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

THE KANSAS CITY SOUTHERN RAILWAY COMPANY ..... *Petitioners*

v. No. 231

ARKANSAS COMMERCE COMMISSION AND ARKANSAS ASSESSMENT COORDINATION DEPARTMENT ..... *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR RESPONDENT ARKANSAS COMMERCE COMMISSION, IN OPPOSITION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

THE KANSAS CITY SOUTHERN RAILWAY COMPANY ..... *Petitioners*

v. No._____

ARKANSAS COMMERCE COMMISSION AND ARKANSAS ASSESSMENT COORDINATION DEPARTMENT ..... *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION IN OPPOSITION

OPINION BELOW

The decision of the Supreme Court of Arkansas dated April 13, 1959, appears in the Petition at pages 25-38.

JURISDICTION

Respondent contends jurisdiction of this Court is not invoked.

QUESTION PRESENTED

The question presented is whether any title, right or privilege of petitioner under the Constitution of the United States has been denied and whether reason exists for the granting of the Writ of Certiorari.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The alleged statute and constitutional provisions involved herein are set forth in Appendix "C", Page 34 of Petitioners brief.

STATEMENT

This appeal challenges the decision of the Supreme Court of Arkansas, dated April 13, 1959.

The original assessment fixed by the Director of the Arkansas Assessment Coordination Department against appellant's properties for the year 1957 was $4,330,680.

Appellant filed petition for review of the assessment before the Arkansas Commerce Commission on April 3, 1958, the said Commission affirmed the assessment.

On October 14, 1958, the Pulaski Circuit Court entered judgment affirming the order of the Commission. Appeal was taken and entered modifying the judgment of the Circuit Court.

Petition for Writ of Certiorari has been filed herein.

ARGUMENT

The issue in the present case is uniquely narrow and under no interpretation can it be converted into one warranting review by this Court on certiorari. This matter involves only one tax payer. The circumstances are peculiarly different from others in the industry. On the facts presented, the Supreme Court of the State of Arkansas was manifestly correct in its interpretation. There is no asserted conflict of decision nor in line of the legislative history of the Statutes involved could any other result have been reached. There is no Federal question.

I.

THE DECISION BELOW IS CLEARLY CORRECT

The same arguments advanced for reasons of allowance for writ were made before the various Commissions and Courts in the State of Arkansas and were rejected. These same arguments are answered herein in the order in which they are advanced in the petition.

1. The Court Did Not Err in Refusing to Direct Appellees to Allow Depreciation of RCN D for the Year Preceding the Assessment Year

The court below took into consideration petitioners agreement. In fact, it held the Department could not add $1,462,657 which represented new additions (Page 27, Pet. Brief, Appendix A). In fact, it is the contention of the respondent that the Petitioner was given more credit on this point by the court than the other carriers received.

2. There was no Error in Refusing to Direct Deduction of Economic and Functional Obsolescence.

Essentially the appellants theory is that after all depreciation is figured and taken from the reconstruction costs, then an economic and functional obsolescence figure must be arrived at, and this figure too, deducted from unit value. The Supreme Court in overruling this same argument stated as follows (pages 27-28, Petitioner's Brief, Appendix A):

> "The Railroad contends that 25% should be deducted from the RCN-D value because of functional and economic obsolescence. It is claimed that if the Railroad were to be reconstructed only 37% of the stations and office buildings would be required; that only 47.60% of other buildings would be needed and there would be reconstructed only 44.67% of its shops and engine houses, etc.; that 500,000 net tons of revenue traffic per year is obsolescent and unprofitable; and 4.22% of its total system trackage is obsolescent; that a total of 25% of its property is obsolescent due to functional and economic factors. Undoubtedly functional and economic obsolescence is reflected in both the stock-plus-funded-debt method and the capitalized earnings method of valuation. In both of these methods the Railroad received the benefit of both functional and economic obsolescence. In 1944 a report of the National Tax Association made to a Congressional Committee said: 'It is largely because earnings and stock and bond values reflect the obsolescence which railroads have suffered as a result of over optimism and the advent of competitive transportation agencies that they are regarded as the most reliable evidence of unit value.' And in *Bailey* v. *Megan*, 102 F. 2d 651, it is said: 'A computation of system value based upon average market price of stocks and bonds and a computation based upon a capitalization of net earnings reflect the effect, upon actual value, of obsolescence, of the competition of other means of transportation, and of all factors affecting earnings.'

"If the functional and economic obsolesence is deducted from the RCN-D valuation, such deduction would have to be considered in connection with the other two methods of arriving at a proper valuation. It would hardly be fair that such obsolescence be used where it is to the Railroad Company's advantage, but not be used in an approved formula when to the disadvantage of the Railroad. If the RCN-D value were the only method used in arriving at the valuation for tax purposes, perhaps the deduction for obsolescene would be required. But it must be remembered that this method is only one part of a three-part formula, and the obsolescene is reflected in two of the parts to the advantage of the Railroad. The RCN-D valuation is considerably more than the stock and debt value, but it is only slightly more than the income value. According to appellant's contention with regard to functional and economic obsolescence, the RCN-D value should be about $30 million less than the income value and about $15 million less than the stock and debt value. Such value contended for by appellant apparently would be out of all proportion to the real value as reflected by the other parts of the formula used."

2. *There was no Error in Refusing to Deduct the So-Called Non-Operating Properties Included in the Interstate Commerce Commission RCN-D.*

The petitioner contends that the so-called non-operating properties should have been deducted from the Interstate Commerce Commission RCN-D. These alleged non-operating properties are identified as the Port Arthur Canal & Dock, the Maywood & Sugar Creek Ry. Co., the Texarkana Union Station Trust, and the Naches Bridge Company. The petitioner has been given credit for the Texarkana Union Station Trust for the reason that this particular property is separately assessed in the State of Arkansas. The other properties are not separately assessed in the State of Arkansas. No proof has been of-

fered to the Department, to the Commission, nor to the Court, that these properties are non-utility. The fact that the figures are included in the RCN-D by the Interstate Commerce Commission clearly shows that the properties are utility properties and used for rail purposes.

The Supreme Court on this matter had this to say (page 29, Petitioner's Brief, Appendix A):

> "Appellant says that the Department was in error in refusing to deduct from the RCN-D valuation certain properties which it claims are non-operating, and certain improvements. The Department did allow a deduction for some non-operating properties and on the others mentioned there is substantial evidence that they are not to be classed as non-operating, and that public improvements were deducted."

4. *Working Capital and Materials and Supplies Properly Treated.*

The Arkansas Supreme Court held that the respondent properly handled working capital, materials and supplies. In so holding the Court stated:

> "Appellant maintains that the Department charged the Railroad with a working capital of $3,168,476, which is 12½% of its operating expenses for the previous year, the amount needed by the Railroad for a 45 day period, and that as a matter of fact it actually requires no working capital, because its daily revenues are sufficient to meet its needs in that respect. Whether the Railroad needs working capital is a question of fact. Evidence was introduced to prove that the same method of determining the required amount of working capital is used for every Class I railroad in the State, and we cannot say that the Department was in error in the finding that some working capital is required for Class I railroads."

5. Respondent did not Err in Using 5.75 Capitalization Rate.

The capitalization rate used by Respondent was entirely proper and supported by the evidence. The Court in so holding stated:

> "Appellant next argues that 5.75% should not be used as a capitalization rate. In the Frisco case, a 6% capitalization rate was approved, and this was before taxes. Here, the 5.75% rate is after taxes. If 6% before taxes was reasonable in the Frisco case, certainly it cannot be said that in the case at bar 5.75% after taxes is not justified.
>
> "The next point raised by appellant is that the Department erred in failing to exclude current liabilities and unadjusted credits from the stock and funded debt method of determining value, and we think appellant must prevail on this point. Included in the stock and funded debt valuation are current liabilities and unadjusted credits. Ark. Stat. Sec. 84-606 provides that the assessing authorities 'shall ascertain as nearly as it can and shall consider the market or actual value of all outstanding capital stock and funded debt'. The current liabilities and unadjusted credits in question are not part of the funded debt. They consist of such items as 'traffic and car service balances between appellant and various other companies, audited wages and miscellaneous accounts payable, which include employees' payroll allotments for U.S. Savings Bonds,' and various prudentially accrued taxes, both federal and state, and employees' withholding taxes, railroad retirement, etc., interest matured but unpaid on bonds which have been called as far back as 1945 but holders of some coupons have not been located and they cannot be paid by the trustee who holds the funds in New York,' etc. Appellee points out 'that under the provisions of Sec. 64-605 the Department is directed to include in the valuation every element that adds value to the property'. We fail to see how

current liabilities and unadjusted credits can be considered as adding value to the railroad. Just the opposite effect would appear to be more reasonable. The fact that an engineer or conductor had not cashed his check does not make the railroad worth more."

6. *Respondent did not Err in its Deduction for Non-Operating Properties.*

Respondent allowed property deduction for non-operating property. The petitioner contended that the respondent used $39 million plus for non-utility property wherein the amount deducted should have been $88 million. This is an argument that the market value of the assessment of the L. & A., a separate corporation, should be deducted rather than the stock. The Supreme Court correctly answered petitioner's argument and in so doing stated:

"Appellant owns practically all of the stock of the L. & A. Railroad, which is a separate corporation and is assessed and pays taxes as such. The L. & A. pays taxes on a valuation of $69 million. Since L. & A. pays its own taxes, appellant says it (Kansas City Southern) should have a credit to the extent of the full value on which L. & A. pays taxes, namely, the value of $69 million. The Department allowed a valuation of $18 million on L. & A. It is the contention of the Department that appellant is entitled only to a deduction for the value of the L. & A. stock owned by Kansas City Southern. The Department reached the correct conclusion. Insofar as L. & A. is concerned, Kansas City Southern owns only the stock. If Kansas City Southern had to pay taxes on this stock, certainly it would have to pay only on the value of the stock. But, since Kansas City Southern does not have to pay taxes on the L. & A. stock, the Department having classed it as a non-operating asset, only the value of what

Kansas City Southern owns should be deducted, and that is the value of the stock."

7. The Court did not Err in Failing to Direct Respondents to use the Allocation Factors Computed by Petitioner.

Part VII of petitioner's brief is concerned with the allocation of the Arkansas portion of the unit value to the taxpayer. The respondent found this to be 16.21% while the petitioner contends this should be only 13.41%. Witness for the Department testified that the same method and the same formula was used with reference to the allocation of unit value to the State of Arkansas to this railroad, as was used with reference to other railroads (T. 2,112). Simply stated, petitioner arguments are that this particular method and formula should not be used as to it for the reason that other factors should be used which would be more advantageous such as originating and terminating traffic.

The Supreme Court, after careful study of this matter, determined that the respondents had properly treated this item. (Page 31, Appendix A, Petitioner's Brief.)

"Finally, appellant contends that the Department erred in equalizing appellant's unit value at 20%; that other property in counties in which appellant operates is assessed from a low of 13.82% to a high of 18.08%; that all utilities have been assessed at 20%. In the Frisco case, we said: 'We recognize that obtaining a fair assessment of property has been a serious problem in this State for many years; but we know that considerable headway has been made toward more equitable assessments. Act No. 153 of the Legislature of 1955 shows the labor that the State is undertaking in this regard; and in Sec. 4 of that Act the same figure of 20% is used.' Some classes of property in Arkansas are assessed at more than 20%; other classes are assessed at less than 20%; but the State is striving

for a 20% figure. In this case Frisco has failed to show either that the Commission was in error in fixing the figure at 20%, or that the said figure was arbitrary, or that the said figure would result in confiscation.' Likewise, in the case at bar we do not think the appellant has shown that the Department was in error or that a basis of 20% would result in confiscation."

II

THERE IS NO CONFLICT OF DECISION

The petitioners do not contend that there is any conflict of decision on the questions presented in their petition. They cite no authority or make any argument whatsoever that the issues presented herein have been decided in other cases and that different conclusions reached.

It is the contention of the respondents that there is no conflict of decision and no reason for this court to grant *certiorari* based upon any alleged conflict of decision.

III

THERE IS NO QUESTION OF FEDERAL LAW

Petitioners contend in its brief that the jurisdiction of this court is invoked by reason that a right and privilege was specifically claimed under the constitution and Statutes of the United States, and denied.

The only right alleged to have been denied is that of due process. In its brief in the Supreme Court of Arkansas, Petitioner never mentioned the Constitution of the United States. Only in regard to some of the points raised herein did it make any allegation that even sounded like an attempt to raise a constitutional question. A typical allegation can be found on page 205 of Petitioners Arkansas Supreme Court brief which states:

> "The failure of the Court below to require the department to omit and deduct the full value of these now-operating properties from its RCN-D constitutes a confiscation of the appellant's property without due process of law to the extent not deducted."

Petitioner did not then or does not now allege any facts that would constitute a denial of due process under the Federal Constitution.

Whenever, by the laws of a state, or by state authority, a tax is imposed, and those laws provide for a mode of conforming or contesting the charge thus imposed in the ordinary course of justice, with proper notice; due process is afforded. *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U.S. 112, 41 L. ed 369, 17 S. Ct. 56; *Davidson* v. *New Orleans*, 96 U.S. 97; 24 L. ed 616.

The mere fact that a person is unsuccessful in a court in a matter involving, life, liberty, or property does not show that there has been a violation of the due process of law guaranty. *Golta* v. *Weeks*, 271 U.S. 536, 70 L. E. 1047, 46 S. Ct. 613; *Palmer* v. *Ohio*, 248 U.S. 32, 63 L. ed. 108, 39 S. Ct. 16.

It is well settled that an *ad valorem* tax may be levied on an interstate carrier without violation of the Fourteenth Amendment. *Braniff Airways* v. *Nebraska State Board*, 347 U.S. 590, 98 L. ed 967, 74 S. Ct. 757.

Simply stated petitioner did not, and has not to this court, presented a federal question.

CONCLUSION

It is submitted that the Arkansas Supreme Court opinion below is correct; all similar situated taxpayers were treated the same as the Petitioner; there is no conflict of Decision; no federal question exists; and the Petition for certiorari should be denied.

Respectfully,

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Certificate of Service

I, hereby certify I have mailed copies of the brief to all attorneys of record.

HARRY E. MCDERMOTT